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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition for Declaratory Ruling That Lenders May Take a Limited Security Interest in an FCC License	MMB File No. 910221A

REPLY COMMENTS OF MORRISON & FOERSTER

Approximately twenty parties have commented on Hogan & Hartson's petition for a declaratory ruling that a creditor may take a limited security interest in an FCC license ("the Petition"). All but one urge the Commission to grant the requested relief.

The lone opposition on the record is voiced by a group of six broadcast companies ("the Broadcast Companies") filing jointly.[1] We address these reply comments to the key misstatements of law and fact on which the Broadcast Companies' opposition is based.

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1 The six are Capstar Communications, Inc., Command Communications, Inc., Jones Eastern Broadcasting, Inc., Legacy Broadcasting, Inc., Liggett Broadcast, Inc. and Sinclair Broadcast Group, Inc.

I. The Uniform Commercial Code Does Not Grant A Secured Party Rights That Are Prohibited By The Communications Act.

The Broadcast Companies substantially misconstrue Article 9 of the Uniform Commercial Code ("UCC"). They argue that, by granting the Petition, the Commission would empower secured lenders to take immediate possession of an FCC license upon the borrower's default and to sell or retain it at will, thus eviscerating the Commission's authority under Section 310(d) of the Communications Act to approve license transfers. Broadcast Companies Comments at 5-6.

In this, the Broadcast Companies are simply wrong. Authorizing licensees to give lenders a limited security interest in their FCC licenses would have no such dire effect. Under the Supremacy Clause of the U.S. Constitution, the UCC (a state statute) could not preempt a federal statute such as the Communications Act. This principle is expressly recognized in UCC Section 9-104(a), which states that Article 9 does not apply to "a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property."

Thus, the requirements of the Communications Act that prior agency approval be obtained before any transfer of control or ownership would take precedence. Indeed, lest there be any question, the Commission could require that the security agreement defining the rights and obligations of the borrower and lender include explicit terms protecting the agency's statutory authority to approve any transfers of the license. See, e.g., Carta Corporation, 3 FCC Rcd 798, 800 (1988)(requiring disclosure of terms governing security interests in stock of a corporate licensee).

The cases cited by commenters demonstrate how UCC principles have accommodated the requirements of various regulatory schemes.[2] The operation of the UCC in conjunction with such schemes is no mystery,[3] and the Commission need not -- and should not -- join in the Broadcast Companies' misguided speculation on that score.

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2 See Morrison & Foerster Comments at 15-18 (certificates of public convenience and necessity issued by the ICC and state public utilities commissions, airport landing slots, servicing rights for FNMA and FHLMC mortgages, liquor licenses); Ameritrust Co., N.A., et al. Comments at 16-19 (state-regulated franchise agreements, health care certificates of need); O'Melveny & Myers Comments at 5 (U.S. Forest Service special use permits).

3 For example, in Rushmore State Bank v. Kurylas, Inc., 424 N.W.2d 649 (S.D. 1988), the holder of a state liquor license granted a security interest in its license to a bank. In response to a claim that the grant was invalid, the court held that such security interest could attach to the extent of the conditional privilege held by the debtor. Further, the court held that foreclosure did not give the secured party the right to effectuate the transfer of the license; rather, the secured party would have to comply with applicable transfer restrictions imposed by state and local authorities, including review and approval of the transferee by the licensing authorities.

II. The Commission's Current Policy Has Chilled Lending To FCC Licensees.

The Broadcast Companies' statements concerning the current climate for financing FCC licensees reflect two fundamental misunderstandings of the facts that gave rise to the Petition.

First, their assertion that any shortage of available capital results solely from the downturn in the national economy, Broadcast Companies Comments at 1, ignores the problem illustrated by the decision in In re Oklahoma City Broadcasting Co., 112 B.R. 425 (W.D. Okla. 1990). There, the bankruptcy court held that the secured creditor was entitled only to the liquidation value of the non-license station assets, not to the value of those assets as a going concern. A contrary result, stated the court, would only occur if the license were also being sold.

The record in this proceeding firmly establishes that the Oklahoma City Broadcasting holding is a significant contributing factor to the current shortage of financing for FCC licensees. See, e.g., Ameritrust Co., N.A., et al. Comments at 7, Security Pacific Corp. Comments at 1, American Security Bank Comments at 1. As one major lender has stated, "Cases [such as Oklahoma City Broadcasting] have understandably shaken lender confidence and have contributed significantly to the current unavailability of broadcast financing." Ameritrust

Co., N.A., et al. Comments at 7. Although a weaker economy may require lenders to be more concerned with their rights in the event of default, it does not follow that these general economic conditions are the sole cause of the financing shortage.

Second, the Broadcast Companies' assertion that a change in Commission policy will not increase the availability of funds, Broadcast Companies Comments at 14, is similarly at odds with the record. While it is undoubtedly true that lenders will provide financing only if a proposed transaction makes "business sense," id., one indisputable factor in whether a transaction makes "business sense" is whether the lender can be assured that its loan is adequately secured in the event of default. See, e.g., Ameritrust Co., N.A., et al. Comments at 4; Canadian Imperial Bank of Commerce Comments at 4. Although changing the Commission's policy may not necessarily be the panacea for all funding problems, the record belies the Broadcast Companies' view that granting the requested relief will have no beneficial effect.

* * * * *

Because the Commission's current policy prevents lenders from adequately securing loans by barring them from taking a security interest in an FCC license -- an asset typically worth 10 to 20 times the value of the licensee's other assets combined -- the Commission's policy directly contributes to the current crisis in lending in the communications industry. In addition, because that policy is required neither by the Communications Act nor by public interest considerations, the Commission should issue the requested declaratory ruling and extend this ruling to all licenses issued by the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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